Supreme Court, U.S.

01 105 JUL 17 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

BRET L. KEENEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL RAY HOFFMAN
Counsel of Record
120 North 3rd Street, Suite 100
Bismarck, North Dakota 58501
(701) 355-0900

July 17, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

QUESTION PRESENTED

Are Keeney's predicate convictions for misdemeanor crimes of domestic violence as defined in 18 U.S.C. § 921(a)(33)(A) offenses for which Keeney "has had civil rights restored" under 18 U.S.C. § 921(a)(33)(B)(ii), when North Dakota statute provided that he was not to possess a firearm while on probation for those offenses, and Keeney had successfully come off that probation without any other state firearm prohibitions and without having ever lost any other of his civil rights under North Dakota law on account of those convictions, thus making those offenses non-convictions for purposes of federal firearms prosecution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

ARGUMENT 6

TABLE OF AUTHORITIES

Page

Federal Cases

Caron v. United States, 524 U.S. 308 (1998).....7, 10

McGrath v. United States, 60 F.3d 1005 (2nd Cir. 1995).....7, 8, 9

United States v. Caron, 77 F.3d 1 (1st Cir. 1996)..... 8

United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990).....7, 9

United States v. Fowler, 198 F.3d 808 (11th Cir. 1999)..... 8

United States v. Indelicato, 97 F.3d 627 (1st Cir. 1996)..... 7

United States v. Keeney, 241 F.3d 1040 (2001)..... 1

United States v. Smith, 171 F.3d 617 (8th Cir. 1999)..... 5, 6, 9

United States v. Thomas, 991 F.2d 206 (5th Cir. 1993)..... 8

Federal Statutes

18 U.S.C. § 921(a)(20).....2, 7, 8, 9

18 U.S.C. § 921(a)(33)(A)..... 4

18 U.S.C. § 921(a)(33)(B)(ii) ..... *passim*

18 U.S.C. § 3231..... 6

18 U.S.C. § 3731..... 6

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

NORTH DAKOTA CENTURY CODE

NDCC § 12.1-32-07(3) 2, 4, 7
NDCC § 12.1-33-01(1) 3, 4
NDCC § 12.1-33-02 ..... 2, 4
NDCC § 62.1-02-01(1) 3
NDCC § 62.1-02-01(2) 3, 4, 5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 241 F.3d 1040 and reprinted at App. 1. The order of the United States District Court for the District of North Dakota is not published but reprinted at App. 12.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 26, 2001, the same day as the opinion of the court referred to directly above. On March 9, 2001, the court of appeals granted Keeney an extension of time until March 26, 2001, to file a petition for rehearing (App. 15). A timely petition for rehearing was denied on April 18, 2001 (App. 16). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 921(a)(33)(B)(ii) provides:

A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or

restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) provides in relevant part:

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

North Dakota Century Code § 12.1-32-07(3) provides in relevant part:

The court shall provide as an explicit condition of every probation that the defendant may not possess a firearm, destructive device, or other dangerous weapon while the defendant is on probation.

. . .

North Dakota Century Code § 12.1-33-02 provides:

Except as otherwise provided by law, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment; to vote; to hold, receive, and transfer property; to enter into contracts; to sue and be sued; and to hold offices of private trust in accordance with law.

North Dakota Century Code § 12.1-33-01(1) provides:

A person sentenced for a felony to a term of imprisonment, during the term of actual incarceration under such sentence, may not:

a. Vote in an election; or

b. Become a candidate for or hold public office.

North Dakota Century Code § 62.1-02-01(1) provides:

A person who has been convicted anywhere for a felony involving violence or intimidation, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of ten years after the date of conviction or release from incarceration or probation, whichever is the latter.

North Dakota Century Code § 62.1-02-01(2) provides:

A person who has been convicted of any felony not provided for in subsection 1 or has been convicted of a class A misdemeanor involving violence or intimidation and that crime was committed while using or possessing a firearm or dangerous weapon, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of five years after the date of conviction or release from incarceration or probation, whichever is the latter.

STATEMENT OF THE CASE

Bret Keeney was charged in the District of North Dakota by indictment with two counts of federal firearms violations, both founded upon the allegation that he had been previously convicted in a state court of North Dakota of certain misdemeanor crimes of domestic violence as defined under 18 U.S.C. § 921(a)(33)(A). Keeney did not dispute that any of these prior state misdemeanor convictions met the definition of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A), but did move the district court to dismiss the indictment on the basis that all of the alleged prior convictions were offenses for which he had his civil rights restored as provided for under 18 U.S.C. § 921(a)(33)(B)(ii).

Under North Dakota law, a person convicted of a misdemeanor does not lose any of his civil rights, except 1) the person may not possess a firearm, destructive device, or other dangerous weapon while on probation, and 2) a person convicted of a class A misdemeanor involving violence or intimidation, and that crime was committed while using or possessing a firearm or dangerous weapon as defined by North Dakota law, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of five years after the date of conviction or release from incarceration or probation, whichever is the latter. See, NDCC 12.1-33-02; NDCC 12.1-33-01(1); NDCC 12.1-32-07(3); and NDCC 62.1-02-01(2).

Keeney was a person who lost his right to possess a firearm while on probation under NDCC 12.1-32-07(3).

None of the alleged prior state convictions were convictions under NDCC 62.1-02-01(2), prohibiting him from owning or possessing a firearm for five years after his release from probation. In fact, it is undisputed that upon Keeney's release from incarceration to probation in March, 1997, Keeney's probation officer informed Keeney that "he is not allowed to have a firearm while he is on probation", and that Keeney "did not sign the firearms form because all of his charges were misdemeanors and were not involving firearms or dangerous weapon."

Keeney successfully completed his probation in March, 1999. Thereafter, the events giving rise to the indictment in this case arose.

The district court granted Keeney's motion to dismiss the indictment in this case (App. 12-14). The district court found that "[s]ince the defendant's right to possess firearms has been restored", after being taken away by state statute, Keeney had the benefit of the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii). The court wrote, "To find otherwise would be to ignore the judgment of the State of North Dakota that Mr. Keeney is trustworthy enough to possess firearms. The Court in *Smith* noted that it was rational for Congress to rely upon a state's judgment in these matters. *Smith*, 171 F.3d at 624." (App. 14).

The United States Court of Appeals for the Eighth Circuit reversed the district court, holding that because Keeney did not lose any of his "core cluster" civil rights, he did not have his civil rights restored pursuant to the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii). (App. 1-11). From this decision, Keeney brings this petition.

The district court had jurisdiction of the two count indictment charged against Keeney under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction of the government's appeal of the order dismissing the indictment under 18 U.S.C. § 3731.

ARGUMENT

United States v. Smith, 171 F.3d 617 (8th Cir. 1999), involved a case from Iowa and 18 U.S.C. § 921(a)(33)(B)(ii). In Iowa, a person convicted of a misdemeanor does not lose any civil rights, including, apparently, the right to possess a firearm as this right was not discussed in the case. The Eighth Circuit held that such person cannot have the benefit of the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii) in that the exception only applies to "civil rights [that have been] restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." *Smith*, 171 F.3d at 623, quoting 18 U.S.C. § 921(a)(33)(B)(ii). As the law of Iowa did not provide for the loss of *any* civil rights for a misdemeanant, that person did not have any civil rights restored and thus could not have the benefit of the restoration exception.

In the case at bar, the Eighth Circuit took *Smith* one step further and held that, because Keeney did not lose any of his "core cluster" civil rights, he too did not have his civil rights restored under the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii). These "core cluster" set of civil rights have been identified by various courts of

appeals, in discussions of the restoration exception applicable to predicate felony convictions in 18 U.S.C. § 921(a)(20), as being 1) the right to vote, 2) the right to hold elective office, and 3) the right to sit on a jury. See, e.g., *McGrath v. United States*, 60 F.3d 1005 (2nd Cir. 1995); *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996); and *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990). In so holding against Keeney, and in effect holding that the statutory loss and later restoration of Keeney's right to possess a firearm did not constitute a restoration of civil rights under 18 U.S.C. § 921(a)(33)(B)(ii), the Eighth Circuit, Keeney believes, has decided an important question of federal law that has not been, but should be, settled by this Court. Keeney also believes that the Eighth Circuit has also decided this important federal question in a way that conflicts with this Court's decision in *Caron v. United States*, 524 U.S. 308, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998).

In regard to the issue of this case, Keeney believes that this Court's decision in *Caron* stands for the controlling propositions that 1) you do include the right to possess a firearm as part of a person's civil rights when dealing with a restoration exception, and 2) the primary focus in deciding these questions of restoration of civil rights is the state's judgment that the person is again sufficiently trustworthy to possess firearms. *Caron*, 118 S.Ct. at 2012. What could be more indicative of North Dakota's judgment that Keeney was again sufficiently trustworthy to possess a firearm following his predicate convictions than the specific restoration of that right under NDCC 12.1-32-07(3)? The Eighth Circuit's holding, however, truly ignored North Dakota's judgment and Congress' intent that the whole of North Dakota law

determine predicate convictions and the restoration of civil rights. See, also, *United States v. Caron*, 77 F.3d 1 (1st Cir. 1996).

In *United States v. Fowler*, 198 F.3d 808, 809-810 (11th Cir. 1999), the Eleventh Circuit recognized that "civil rights" is not defined, but cited this Court's decision in *Caron* in its discussion recognizing that firearms rights are indeed part of the civil rights in the restoration exception of 18 U.S.C. § 921(a)(20).

In *United States v. Thomas*, 991 F.2d 206, 212 (5th Cir. 1993), the Fifth Circuit also included the right to carry a firearm in its list of a person's civil rights when discussing the restoration exception of 18 U.S.C. § 921(a)(20).

In *McGrath v. United States*, 60 F.3d 1005 (2nd Cir. 1995), a Vermont felony conviction was the predicate conviction. The court first recognized that under Vermont law felons who were convicted but never incarcerated do not suffer the suspension of any of the "core cluster" set of rights (similar to Keeney here). The court went on, however, to also recognize that Vermont law in no way forbade McGrath from possessing firearms (unlike Keeney here). The Court held, therefore, that McGrath never suffered a deprivation of *any* civil rights by reason of his predicate felony conviction, and thus was not entitled to the restoration exception of 18 U.S.C. § 921(a)(20). What is important is that the Second Circuit looked not only to the "core cluster" set of civil rights, but also to McGrath's right to possess a firearm, in deciding an issue very similar to Keeney's.

Also important, however, is the recognition by the *McGrath* court that 18 U.S.C. § 921(a)(20) was expressly crafted to overrule the federalization of a felon's status by

allowing state law to define which crimes constitute a predicate offense under the statute. The court wrote, "Congress sought to accommodate a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy to possess firearms." *McGrath*, 60 F.3d at 1009. Trustworthiness to again possess a firearm was the key for the court in *McGrath*, and one has to assume that is why they looked not only to the "core cluster" of civil rights, but also to the specific right to possess a firearm, in determining a person's civil rights. Although the Eighth Circuit had previously acknowledged that the restoration exception in § 921(a)(33)(B)(ii) was modeled after that contained in § 921(a)(20), *United States v. Smith*, 171 F.3d at 625, the court failed to follow *McGrath* and the Second Circuit in this regard.

The decision in *McGrath* was in accord with the prior decision in *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990), which also involved 18 U.S.C. § 921(a)(20), and in which the court wrote:

> "A narrow interpretation . . . would frustrate the intent of Congress that we look to *the whole of state law, including state law concerning a convicted felon's firearms privileges* . . . [P]age 12 of Senate Report 97-476 suggests that Congress did not intend that a 'convicted felon' be restored to federal firearms privileges if the restoration was 'based upon considerations *not relating to fitness to own a firearm.*' "

Cassidy, 899 F.2d at 548 (emphasis added). The Eighth Circuit also failed to follow the teachings of the Sixth Circuit that we look to the whole of North Dakota law,

including North Dakota law specifically concerning fitness to again possess a firearm.

Whether Keeney "has had civil rights restored" under 18 U.S.C. § 921(a)(33)(B)(ii) when Keeney lost his right to possess a firearm by state statute, and then was restored that right, is an important question of federal law that has not been, but should be, settled by this Court. Further, Keeney contends that the issue should be settled favorably to him in accord with the decision of this Court in *Caron v. United States*.

Respectfully submitted,

MICHAEL RAY HOFFMAN
Counsel of Record
120 North 3rd Street, Suite 100
Bismarck, North Dakota 58501
(701) 355-0900

July 17, 2001

APPENDIX TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Eighth Circuit, dated February 26, 2001 ...App. 1

Memorandum and Order of Patrick A. Conmy, Senior District Judge, United States District Court, dated April 5, 2000 .....App. 12

Order of the United States Court of Appeals for the Eighth District, Granting Extension of Time to File Petition for Rehearing, dated March 9, 2001 .....App. 15

Order of the United States Court of Appeals for the Eighth District, Denying Petition for Rehearing and for Rehearing En Banc, dated April 18, 2001 .....App. 16

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2170

United States of America,	*	
Appellant,	*	Appeal from the United States District Court for the District of North Dakota
v.	*	
Bret L. Keeney,	*	
Appellee.	*	

Submitted: Dec. 12, 2000.

Filed: Feb. 26, 2001.

Before McMILLIAN and JOHN R. GIBSON, Circuit Judges, and LAUGHREY,[1] District Judge.

McMILLIAN, Circuit Judge.

The United States of America ("the government") appeals a final decision entered in the United States District Court for the District of North Dakota dismissing the indictment charging Bret L. Keeney with firearms violations, 18 U.S.C. §§ 922(a)(6), 922(g)(9). *See United States v. Keeney*, No. C1-00-008 (D.N.D. Apr. 5, 2000) (memorandum and order granting motion to dismiss).

---

[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri, sitting by designation.

For reversal, the government argues that the district court misconstrued the so-called civil rights restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii) in reaching its decision to dismiss Keeney's indictment. For the reasons stated below, we reverse the district court's decision to dismiss Keeney's indictment and remand this matter to the district court for further proceedings consistent with this opinion.

Jurisdiction in the district court was proper based on 18 U.S.C. § 3231. Jurisdiction in this court is proper based on 18 U.S.C. § 3731. The government's notice of appeal was timely filed pursuant to Fed. R. App. P. 4(b).

Background

In 1998, Keeney was convicted in state court of the misdemeanor crime of domestic violence, which conviction resulted from an assault committed against a former live-in girlfriend. Keeney was sentenced to a term of imprisonment followed by probation. The state court also suspended his firearms privileges pursuant to N.D. Cent. Code § 12.1-32-07 during the period of his incarceration and probation. Keeney was released from probation on March 29, 1999.[2]

The North Dakota Criminal Code, N.D. Cent. Code § 12.1-32-07, requires that "[t]he court shall provide as an

---

[2] According to the district court, Keeney was incarcerated from November 13, 1996, to March 3, 1997, and he was on probation from March 29, 1997, to March 29, 1999. *See United States v. Keeney*, No. C1-00-008, slip op. at 2 & n. 1 (D.N.D. Apr. 5, 2000) (memorandum and order).

explicit condition of every probation that the defendant may not possess a firearm, destructive device, or other dangerous weapon while defendant is on probation."[3]

On September 9, 1999, the Bureau of Alcohol, Tobacco and Firearms ("BATF") executed a search warrant on Keeney's residence and found a nine millimeter handgun. Keeney was charged in a two-count indictment with violations of 18 U.S.C. § 922(a)(6) and § 922(g)(9).[4] Section 922(a)(6) prohibits any person from knowingly making false or fictitious statements in connection with the acquisition or attempted acquisition of a firearm.

---

[3] The North Dakota Criminal Code further states:

> 1. A person who has been convicted anywhere for a felony involving violence or intimidation, as defined in chapters 12.1-16 through 12.1-25, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of ten years after the date of conviction or release from incarceration or probation, whichever is later.
>
> 2. A person who has been convicted of any felony not provided for in subsection 1 or has been convicted of a class A misdemeanor involving violence or intimidation and that crime was committed while using or possessing a firearm or dangerous weapon . . . is prohibited from owning a firearm or having one in possession or under control from the date of conviction or continuing for a period of five years after the date of conviction or release from incarceration or probation, whichever is the latter.

N.D. Cent. Code 62.1-02-01.

[4] The indictment also included a violation of 18 U.S.C. § 924(a)(2), which is the penalty provision of the federal firearms statute. Record on Appeal at 7-8.

Section 922(g)(9) prohibits persons convicted of a misdemeanor crime of domestic violence from possessing a firearm.[5] Both offenses were predicated on Keeney's prior conviction for a misdemeanor crime of domestic violence under North Dakota law. Keeney moved to dismiss the indictment pursuant to the so-called civil rights restoration exception, which provides:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii).

---

[5] The indictment stated that:

> in connection with [Keeney's] attempted acquisition of a firearm . . . [he] knowingly made a false and fictitious written statement on a Firearms Transaction Record Form . . . which statement was likely to deceive [the seller] with respect to a fact material to the lawfulness of such attempted acquisition of the firearm by [Keeney] under the provisions of Chapter 44, Title 18, United States Code, in that [Keeney] falsely represented that he had never been convicted in any court of a misdemeanor crime of domestic violence, which in truth and fact, as [Keeney] then well knew, he had been convicted of misdemeanor Assault and Menacing a person similarly situated to a spouse.

Designated Record on Appeal at 7.

Keeney argued that his prior conviction did not count for purposes of applying the federal firearms statutes because his civil rights had been restored following his state conviction. The district court granted Keeney's motion to dismiss, reasoning that Keeney's right to possess a firearm was taken away while he was on probation and that, when the alleged federal offenses occurred, he was no longer on probation and his civil rights had been restored. The court further reasoned that Keeney's probation was included in the "judgment of his conviction and was part and parcel of his punishment which included" incarceration and that, once Keeney's probation ended, his right to possess firearms was automatically restored. Slip op. at 2. The district court concluded that because Keeney's right to possess firearms had been restored, his predicate conviction could not be considered a "misdemeanor crime of domestic violence." *Id.* at 3.

The district court distinguished *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999), in which this court refused to extend the restoration exception to a defendant who was convicted of an underlying misdemeanor offense which did not involve a loss of civil rights. The district court distinguished *Smith* based on its reasoning that the Iowa statute under which the defendant in *Smith* was originally convicted did not strip misdemeanor offenders of any of their civil rights while Keeney's conviction for domestic violence required that his right to possess a firearm be taken away while he was on probation. The district court assumed that the privilege of possessing a firearm is commensurate with the loss of civil rights pursuant to 18 U.S.C. § 921(a)(33)(B)(ii). In reaching its conclusion that it could not ignore "the judgment of the

State of North Dakota" that Keeney was trustworthy to possess a firearm, the district court noted the observation in *Smith*, 171 F.3d at 624, that Congress relied on each state's judgment in this regard. *See* slip op. at 2-3. The district court also referred to *McGrath v. United States*, 60 F.3d 1005, 1008 (2d Cir. 1995), where the Second Circuit surveyed judicial interpretations regarding the restoration of civil rights pursuant to the restoration exception. The district court did not articulate whether it sought to follow *McGrath* or to distinguish it. This appeal followed.

Discussion

We review *de novo* the district court's decision to grant Keeney's motion to dismiss the indictment. *See Smith*, 171 F.3d at 619. For reversal, the government contends that Keeney did not lose his civil rights within the meaning of the restoration exception. The government argues that, because the plain language of § 921(a)(33)(B)(ii) uses the term "civil rights" in the plural, Congress intended that more than a single civil right had to be restored. The government further argues that the "civil rights," which those convicted of a felony typically lose, include the rights to vote, to serve on a jury and to hold public office. The government suggests that, therefore, Congress did not intend that the restoration exception would apply where these rights were not lost. It further suggests that because Keeney did not lose this core cluster of civil rights pursuant to his conviction under North Dakota law, he did not lose his civil rights within the meaning of the restoration exception. The government additionally argues that, because Keeney did not

lose his civil rights upon his conviction, they could not be restored upon the completion of probation.

We respectfully disagree with the analysis of the district court. As stated in *Smith*, 171 F.3d at 623, "§ 921(a)(33) only applies to 'civil rights [that have been] restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense).' " We refused, in *Smith*, to accept the defendant's argument that, because he did not forfeit civil rights pursuant to his underlying state conviction, his right to equal protection under the Fifth Amendment would be violated absent application of the restoration exception to him. *See id.* at 624. We reasoned that, because most misdemeanor convictions do not result in the loss of civil rights, to hold otherwise would permit the exception to swallow the rule. *See id.* at 624. In reaching this conclusion, we noted that, because the federal firearms statute is concerned with "preventing a known . . . domestic abuser from later using a firearm to inflict the next bout of abuse," and because Congress was cognizant of the fact that domestic abuse offenders who were successful in pleading a felony charge down to a misdemeanor could escape the effect of the felon-in-possession statutes, Congress included, in the firearms statute, a prohibition on possessing a firearm by a domestic abuser convicted of a misdemeanor. *Id.* at 625. Additionally, we emphasized the parenthetical language in the restoration exception which requires that "the law of the applicable jurisdiction [provide] for the loss of civil rights under such an offense." *Id.* at 623. Thus, a defendant must have lost his or her civil rights pursuant to state statute in order to assert that the restoration exception is applicable. Keeney does not refute

that his predicate offense of misdemeanor domestic abuse was within the class of offenses included within the prohibition of 18 U.S.C. § 922, but rather he argues that the restoration exception applies to him because his civil rights were taken away pursuant to his conviction and, subsequently, pursuant to North Dakota statute, restored when he was released from probation.

The Second Circuit in *McGrath* held that a felon's retention of civil rights upon his or her conviction was not the functional equivalent of having had civil rights "restored" for purposes of the civil rights exception granted by § 921(a)(20). 60 F.3d at 1007.[6] The Second Circuit further held in *McGrath* that "the ordinary meaning of 'restore' could not encompass a person whose rights were never disabled." *McGrath* at 1007, *citing United States v. Ramos*, 961 F.2d 1003, 1008 (1st Cir. 1992). Therefore, the Second Circuit's opinion in *McGrath* and the First Circuit's opinion in *Ramos* are consistent with this circuit's holding in *Smith*. Each of these cases holds that the restoration exception only applies to a defendant whose civil rights were both lost and restored pursuant to state statutes.

We consider whether, under North Dakota law, Keeney first lost and then had his "civil rights" restored within the meaning of § 921(a)(33)(B)(ii). Unless North Dakota law provided for the loss of Keeney's civil rights, the restoration exception is not applicable to him. *See*

---

[6] In *United States v. Smith*, 171 F.3d 617, 625 (8th Cir. 1999), this court acknowledged that the restoration exception in § 921(a)(33) was modeled after the restoration exception in § 921(a)(20).

McGrath, 60 F.2d at 1007. Under North Dakota law, a person convicted of a crime does not necessarily suffer the loss of civil rights. N.D. Cent. Code § 12.1-33-02 states that:

> a person convicted of a crime does not suffer . . . loss of civil rights . . . but retains all of his [or her] rights, political, personal, civil, and otherwise, including the right to hold public office or employment; to vote; to hold, receive, and transfer property; to enter into contracts; to sue and be sued; and to hold offices of private trust in accordance with law.

Because the general statutory provision, N.D. Cent. Code § 12.1-33-02, specifically states that civil rights, as defined in that statute, are not lost automatically pursuant to a criminal conviction, the specific provisions of the North Dakota statutes under which Keeney was sentenced must be considered to determine if he suffered a loss of civil rights. N.D. Cent. Code § 12.1-32-07 imposes a prohibition on possessing a firearm as a condition of probation. The state court, upon sentencing Keeney for misdemeanor domestic abuse, imposed such a condition. We, therefore, consider whether loss of the right to possess a firearm, pursuant to North Dakota statute, is the loss of civil rights under § 921(a)(33)(B)(ii).

In *McGrath*, the Second Circuit held that the civil rights in question under 18 U.S.C. § 921(a)(20) "are those which most states extend by virtue of citizenship within their borders: (i) the right to vote; (ii) the right to hold elective office; and (iii) the right to sit on a jury." 60 F.3d at 1007. In *United States v. Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996), the First Circuit likewise held that "[a]lthough

the Congress did not specify which civil rights it had in mind, [in § 921(a)(33)(B)(ii)] the plurality view among the circuits – explicitly adopted by the [First Circuit in *United States v. Caron*, 77 F.3d 1, 2 (1st Cir. 1996)] – is that Congress had in mind the core cluster of 'citizen' rights . . . namely, the right to vote, to serve on a jury and to hold public office". Significantly, § 921(a)(20) and § 921(a)(33)(B)(ii) both refer to civil rights in the plural, thus suggesting that Congress intended to include a cluster of rights, as referenced in *McGrath*, within the meaning of the term "civil rights" as contained in these provisions. *See Smith*, 171 F.3d at 620 (construing a statute, a court looks first to the plain meaning of its words). Although, as noted in *Indelicato*, 97 F.3d at 631 & n.3 (citations omitted), most circuits have held that "all three civil rights must be restored to avoid the federal ban" on possession of firearms, we need not reach that issue because Keeney did not lose any of the rights within the core cluster. We further note that N.D. Cent. Code § 12.1-33-02 designates civil rights which a criminal defendant does not automatically lose, including the right to vote and to hold office, which are among the rights the Second Circuit in *McGrath* found were included in the core cluster of civil rights in question under 18 U.S.C. § 921(a)(20); N.D. Cent. Code § 12.1-33-02 does not mention the possession of firearms.

Consistent with our opinion in *Smith* and the Second Circuit's opinion in *McGrath*, we hold that Keeney did not lose his [sic] any of his civil rights within the core cluster and, thus, did not have his civil rights restored pursuant to the restoration exception of § 921(a)(33)(B)(ii). We further hold that because the restoration exception did not

apply to Keeney, the district court improperly dismissed Keeney's indictment for violations of 18 U.S.C. §§ 922(a)(6) and 922(g)(9).

Conclusion

For the reasons stated above, we hold that Keeney did not lose his civil rights, and, therefore, did not have his civil rights restored, within the meaning of the restoration exception, 18 U.S.C. § 921(a)(33)(B)(ii). We, therefore, reverse the decision of the district court granting Keeney's motion to dismiss the indictment against him, and we remand this matter for further proceedings consistent with this opinion.

A true copy.

Attest:

U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	Case No. C1-00-008
vs.	)	
	)	
Bret L. Keeney,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Before the Court is a Rule 12 motion to dismiss submitted by the defendant. The defendant has been charged in a two-count indictment with making false representations in the attempted acquisition of a firearm and being a prohibited person in possession of a firearm. 18 U.S.C. § 922(a)(6) & 924(a)(2); 18 U.S.C. § 922(g)(9) & 924(a)(2). Both offenses are predicated upon the defendant having been convicted of misdemeanor crimes of domestic violence under North Dakota law. There is no dispute that the predicate convictions were domestic in their nature.

In his motion the defendant argues that he has had his civil rights restored and thus he should benefit from the federal restoration exception. The restoration exception provides that if a person has had his conviction expunged, been pardoned or had his civil rights restored that person shall not be considered to have been convicted of such an offense for purposes of the Chapter. 18 U.S.C. § 921(a)(33)(B)(ii). A person convicted of a misdemeanor in North Dakota generally does not lose his civil

rights. N.D.C.C. § 12.1-33-02. However, Mr. Keeney was prohibited from possessing a firearm as a term of probation. Such a term of probation is required by North Dakota law. N.D.C.C. § 12.1-32-07. The defendant was no longer on probation when the alleged offenses occurred.

The question presented is whether the restoration exception applies when the right to possess firearms was "restored" by virtue of the running of a period of probation that prohibited such possession. The defendant argues that it does. The government argues that a condition of probation is not a loss of civil rights and cites *United States v. Smith,* 171 F.3d 617 (8th Cir. 1999). *Smith* was a case out of Iowa in which the Court refused to include within the restoration exception a person convicted of a misdemeanor crime of domestic violence who had not been stripped of any of his civil rights. *Id.* at 623-24. Iowa does not strip misdemeanor offenders of any of their civil rights. *Id.* at 623. The Court held Smith's civil rights could not be restored since they were never taken away and upheld the conviction. *Id.* at 623-24.

In the present case Mr. Keeney's right to possess a firearm was taken away for two years while he was on probation. His term of probation was included in the judgment of conviction and was part and parcel of his punishment which also included a sentence of nine months incarceration.[1] This was done pursuant to North

---

[1] It appears from documentation submitted with the defendant's brief that he was actually incarcerated from November 13, 1996 to March 3, 1997 and that he was on probation from March 29, 1997 to March 29, 1999. The offenses charged in the Indictment occurred on or about July 7, 1999 and September 9, 1999.

Dakota statute which requires that every probationer be prohibited from possessing firearms as a condition of probation. N.D.C.C. § 12.1-32-07. Once Mr. Keeney's probation ended his right to possess firearms was automatically restored. See *McGrath v. United States*, 60 F.3d 1005, 1008 (2d Cir. 1995) (surveying the various means by which states restore civil rights including automatic restoration). Since the defendant's right to possess firearms has been restored, his predicate conviction cannot be considered a "misdemeanor crime of domestic violence." 18 U.S.C. § 921(a)(33)(B)(ii). To find otherwise would be to ignore the judgment of the State of North Dakota that Mr. Keeney is trustworthy enough to possess firearms. The Court in *Smith* noted that it was rational for Congress to rely upon a state's judgment in these matters. *Smith*, 171 F.3d at 624.

Accordingly, the Court hereby **ORDERS** that the defendant's motion to dismiss (Docket No. 18) is **GRANTED.** The Indictment is **DISMISSED.** All further pending motions in this file are dismissed as moot.

SO ORDERED.

Dated this 5th day of April, 2000.

/s/ Patrick A. Conmy
Patrick A. Conmy,
Senior District Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2170NDBI	*	
United States of America,	*	Appeal from the United States District Court for the District of North Dakota
Appellant,	*	
vs.	*	
Bret L. Keeney,	*	
Appellee.	*	

The motion of appellee for an extension of time until Monday, 3/26/01 to file a petition for rehearing is granted.

(5276-010199)

March 9, 2001

Order entered Under Rule 27B(a):

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2170	*	
United States of America,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellant,	*	
	*	
vs.	*	
	*	
Bret L. Keeney,	*	
Appellee.	*	
	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

April 18, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit